Supreme Court, U.S.
FILED

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No. 03 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
Deanell Tacha, Chief Judge,
United States Court of Appeals
for the Tenth Circuit, et al.,
Respondents.

On Appeal to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL APPENDIX NOS. 4 and 5

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APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,

Doc. 21

Plaintiff,

v.

Civ. No. 01-2627

UNITED STATES COURT OF APPEALS OFFICE, FOR THE TENTH CIRCUIT JUDGES, et al.,

FILED
FEB 10 2003

Defendants.

MEMORANDUM OPINION

This matter comes before the Court upon defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] The plaintiff's complaint alleges that the defendants are: (1) criminally liable under 18 U.S.C. §§ 242 and 371 (2000), for violations of the plaintiff's First, Fifth , and Seventh Amendment rights of the United States Constitution; and (2) civilly liable for damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) ("Title VII"), as a result of his termination by the United States Department of Energy ("DOE"), purportedly in retaliation for allegations he made that the DOE had

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1. Because of the plaintiff's status as a pro se litigant, this Court issued an Order on January 3, 2003, as required by Fox v. Strictland, 837 F.2d 507 (D.C. Cir. 1988), wherein the plaintiff was notified of the potential consequences of failing to fully and completely respond to the defendants' dismissal motion. The plaintiff has failed to respond to the Court's Order.

engaged in violations of safety and environmental laws.[2] Original Complaint ("Compl.") at 1. Upon consideration

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2. While it is unclear from the plaintiff's original complaint whether he is asserting claims against the defendants in both their official and individual capacities, in a subsequent memorandum submitted to the Court, he clearly states that his claims are only against the defendants in their official capacities. See Memorandum in Support of Motion for Leave of Court to File Amended Complaint and Judicial Notice of Adjudicative Facts ¶ 37. In addition, in this same memorandum, the plaintiff sought leave of court to amend his com- plaint to indicate that this Court should take judicial notice of certain adjudicative facts that he claims the defendants admitted to by not filing a brief in opposition to his petition for a writ of certiorari before the United States Supreme Court. Apparently , the plaintiff is also seeking to add the Chief Justice's name to the list of defendants in the caption of this case. While this Court recognizes that pursuant to Fed.R.Civ.P. 15(a) leave to file an amended complaint "shall be freely given when justice so requires[,]" the Court concludes that no such need exists in this case. The Court agrees with the defendants that justice does not require the amendment of a complaint when such an amendment would be futile. See James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996); Moldea v. New York Times, 22 F.3d 310, 319 (D.C. Cir. 1994). First, the Court notes that the defendants in this case are not parties to the case that is the subject of the plaintiff's petition for a writ of certiorari and thus were not obligated to file a brief with the Supreme Court in that case. In addition, even if they had been parties in that case, the filing of an opposition brief is voluntary and not a mandatory obligation and therefore the failure to file an opposition cannot constitute an admission. See Sup.Ct. R. 12(6). Second, the Court notes that the plaintiff's apparent attempt to add Chief Justice Rehnquist as a defendant in this case is futile. This is because the plaintiff fails to assert any additional claims against the Chief Justice that would survive a motion to dismiss, as he failed to assert any factual allegations or claims against Chief Justice Rehnquist, and even if he had, any such claims against Chief Justice Rehnquist would have to be dismissed for the same reasons the Court, as set forth below, is dismissing the claims against the New Mexico district judge and the Tenth Circuit judges.

of the parties' submissions regarding the defendants' motion and for the reasons set forth below, the Court will grant the defendants' motion to dismiss because it is impermissible to bring a private cause of action under 18 U.S.C. §§ 242 and 371. Also, the plaintiff has failed to state a claim upon which relief can be granted under Title VII because he has never been an employee of the defendants. In addition, the Court notes that even if it were to construe the plaintiff's pro se complaint liberally and conclude that a claim under 42 U.S.C. § 1983 (2000) has been asserted, the claim would still have to be dismissed. This is because a § 1983 claim upon which relief could be granted can never be established against a federal government official for the performance of his or her official duties, and in any event the defendants are entitled to the protection of absolute immunity.[3]

I. Factual Background

In April 1993, the plaintiff began his employment at the DOE as an Environmental Scientist at the Carlsbad Area Office in Southeastern New Mexico. Compl. ¶ 9. In September 1997, the plaintiff filed a claim with the DOE's Merit System Protection Board ("MSPB") after the DOE notified him that it proposed to terminate his employment because of poor job performance. See Rockefeller v. Abraham, Nos. 01-2054, 00-2480, 2001 WL 1434623 , at *1 (10th Cir. Nov. 15, 2001). In his claim before the MSPB, the plaintiff alleged that the proposed termination was in retaliation for alleged whistle-

3. The defendants also assert that the plaintiff's complaint should be dismissed pursuant to Fed.R.Civ.P 12(b)(1), 12(b)(3), and 12(b)(5) for lack of subject matter jurisdiction, personal jurisdiction, and venue. However, this Court need not address these arguments because it concludes that dismissal is appropriate on other grounds.

blowing activities he had engaged in regarding his prior identification of the DOE's purported violations of safety and environmental laws. Id. In November 1997, an MSPB administrative judge issued an initial decision finding that the plaintiff had not engaged in protected whistle-blowing activities, and the plaintiff filed a petition for review of that decision with the MSPB. Id.

Upon actually being terminated by the DOE in December 1997, the plaintiff filed another claim with the MSPB asserting that he was fired because of an alleged disability, as retaliation for having engaged in protected activities.[4] Id. After an administrative hearing was held on these claims, the MSPB ruled in favor of the DOE, concluding that it had sustained its burden of proof by demonstrating that the plaintiff's termination was due to his unacceptable job performance. Id. In addition, the MSPB held that the plaintiff failed to prove that he engaged in protected whistle-blowing activity, that his termination resulted from employment discrimination, that he suffered from a disability, or that his termination was related to a disability. Id. Plaintiff then filed a petition for review with the MSPB, which was later then voluntarily dismissed by the plaintiff. Id. In granting the plaintiff's request for voluntary dismissal, the MSPB required that if plaintiff re-filed his petition, he had to do so by a specified deadline. Id. When plaintiff attempted to re-file his petition after the expiration of the designated deadline, the MSPB denied the petition due to its untimeliness and the plaintiff's failure to show good cause why it should be accepted late. Id

Thereafter, the plaintiff filed a complaint with the Equal Employment Opportunity Commission,

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4. The nature of the plaintiff's alleged disability is unclear from what is set forth in the complaint.

which was later denied for lack of jurisdiction. Id. After the EEOC dismissal, the plaintiff filed a complaint in the United States District Court for the District of New Mexico alleging that: (1) the DOE denied him reasonable accommodations for his dis abilities as guaranteed by the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12,181- 89 (2000), and the Rehabilitation Act, 29 U.S.C. §§ 701- 96 (2000); and (2) he suffered an adverse employment action in violation of Title VII by being placed under a "Performance Improvement Plan" in retaliation for complaining to the DOE's Equal Employment Opportunity Office ("EEO"). See Rockefeller, 2001 WL 1434623, at *2. The plaintiff then amended his complaint to include an allegation that he was improperly removed from his employment for engaging in whistle-blowing activities, in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h) (2000). See Rockefeller 2001 WL 1434623, at *2. The plaintiff later filed another complaint, which was consolidated with his amended complaint, wherein he alleged that the DOE violated the ADA and Rehabilitation Act by intimidating his physicians in an effort to prevent him from receiving proper treatment. Id.

While the plaintiff's case was pending before the District Court of New Mexico, he filed several motions, including a motion to compel production of documents and a motion for the court to accept a 748-page document as self-authenticating. Id. The district judge denied the motion to compel on the grounds that it was overly broad and unduly burden -some. The court also denied the motion for the acceptance of the putative self-authenticated document, but instructed the plaintiff to submit for its consideration any parts of the document that he believed would preclude the entry of summary judgment for the defendant. Id. The district court awarded summary judgment to the defendant on the

ADA and Rehabilitation Act claims on the ground that both acts authorize an employer to request an employee's medical information while a request for an accommodation due to a claimed disability is under consideration. Id. The court dismissed the plaintiff's remaining claims because (1) section 3730(h) of the FCA does not provide a remedy for discrimination against a federal employee, such as the plaintiff, but rather, is only applicable to a suit by a private person; (2) the court lacked jurisdiction over the MSPB appeal, as only the United States Court of Appeals for the Federal Circuit has jurisdiction to review MSPB jurisdictional decisions involving mixed claims; and (3) the complaint filed in the district court was untimely. Id at 2-4. The plaintiff appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's decision and denied the plaintiff's motion for a remand. The plaintiff subsequently filed the complaint that is now before this Court, in which he has named as defendants the district court judge in New Mexico who presided over his case that was filed there and the Tenth Circuit judges who comprised the three-judge panel that affirmed the district judge's rulings.

II. Standard of Review: Rule 12(b)(6)

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). However, the Court need not accept inferences or conclusory allegations that are unsupported by

the facts set forth in the complaint. Kowal, 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incor- porated by reference in the complaint, and matters about which the Court may take judicial notice. E.E.O.C. v. St. Francis Xavier Paraochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997). The Court may dismiss a claim pur- suant to Rule 12(b)(6) only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

III. Legal Analysis

(A) The Plaintiff's Claims Pursuant to 18 U.S.C. §§ 242, 371 for Violations of his Constitutional Rights.

The plaintiff brings this pro se action against the defendants under 18 U.S.C. §§ 242 and 371 (2000) for alleged violations of the First, Fifth, and Seventh Amendments of the United States Constitution. However, the plaintiff is precluded from asserting any claims pursuant to 18 U.S.C. §§ 242 and 371 because, as criminal statues, they do not convey a private right of action. See Dugar v. Coughlin, 613 F. Supp. 849, 852 n.1 (S.D. N.Y. 1981) (stating that 18 U.S.C. § 242 does not create a private right of action); Fiorino v. Turner, 476 F.Supp. 962, 963 (D. Mass. 1979) ("With regard to the alleged violations of 18 U.S.C. §§ . . . 242 [and] . . . 371 . . . the plaintiff has failed to cite, and the court has been unable to locate, any authority which would support implying a civil cause of action for violations of these provisions."). Therefore, the Court must dismiss the plaintiff's claims that have been brought pursuant to 18 U.S.C. §§ 242 and 371.

(B) The Plaintiff's Claims Pursuant to Title VII

The plaintiff has also filed a claim under Title VII of the United States Code. Title VII makes it unlawful for an employer to discriminate against any of its employees. See 42 U.S.C. § 2000e. Thus, the determination of whether an individual is an employee os of "crucial significance for those seeking to redress alleged discriminatory actions in federal employment." Spirides v. Reinhardt, 613 F.2d 826, 829-30 (D.C. Cir. 1979). The analysis used to determine whether an employee-employer relationship exists requires the Court to weigh numerous factors regarding the work relationship. Although no one factor is determinative, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review. See Redd v. Summers, 232 F.3d 933, 938 (D.C. Cir. 2000) (quoting Spirides, 613 F.2d at 831). The other additional factors for the Court to consider include: (1) the kind of occupation; (2) the skill required; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes, and (11) the intention of the parties. Id. at 939. Applying each of these factors to the instant case, it is abundantly clear that the plaintiff has never been an employee of the defendants, but was merely a party to a lawsuit presided over by the defendant judges. Therefore, the Court is compelled to find that the plaintiff has failed to state a claim upon which relief can be granted under Title VII.

Accordingly, the plaintiff's Title VII claim must also be dismissed.

(C) The Plaintiff's Status as a Pro Se Party and the Liberal Construction of his Complaint

Although the Court finds that a liberal reading of the plaintiff's complaint requires the conclusion that he has failed to state a claim upon which relief can be granted, because the plaintiff is a pro se litigant, his complaint must be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding that allegation in pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers). For example, in Dixon v. State of Maryland by Carter, 261 F.Supp. 746, 747 (D. Md. 1966), where the court was faced with a pro se complaint alleging a private cause of action pursuant to 18 U.S.C. § 242, the court liberally construed the plaintiff's complaint as asserting a claim for a violation under 42 U.S.C. § 1983 because it recognized that the plaintiff could not pursue a civil claim pursuant to 18 U.S.C. § 242. Id.; see also Powell, 511 F.Supp. at 704. Viewing the complaint here even from a liberal perspective, however, does not yield a different result.

(1) The Plaintiff is Unable to State a Claim Under 42 U.S.C. § 1983

Even if a liberal construction of the plaintiff's complaint permitted the Court to conclude that a claim pursuant to 42 U.S.C. § 1983 was being asserted, the plaintiff would still be unable to state a claim upon which relief can be granted. To estab - lish a claim under § 1983, a plaintiff must prove two elements: (1) "that the defen- dant deprived him of a right secured by the Constitution and the laws of the United States" and (2) "the . . . defendant deprived him of this constitutional right under color of . . . State [law]." Adickes v. Kress & Co., 398 U.S.

144, 150 (1970). However, the "[a]ctions of the Federal Government or its officers are exempt from [§ 1983's] proscriptions." Powell, 511 F.Supp. at 704 (citing District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973)) Thus, because all of the acts the plaintiff is challenging were being performed by individuals who were acting in their official capacities as federal government officials, the defendants' acts are exempt from suit under § 1983.

(2) The Defendants are Protected by Absolute Immunity

The Supreme Court has established two avenues by which public officials may receive immunity from personal liability in a civil action for damages: absolute and qualified immunity. To determine whether an official is entitled to either absolute or qualified immunity depends upon the function being performed by that official. See Forester v. White, 484 U.S. 219, 224 (1988). A public official performing a discretionary function receives qualified immunity in a civil action, provided that his or her conduct does not violate "clearly established federal statutory or constitutional rights" of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1972). On the other hand, absolute immunity is provided when the plaintiff's claim against the defendant is directly attributable to the defendant's performance of judicial, legislative, or prosecutorial functions. See Forrester, 484 U.S. at 227. In Forrester, the Supreme Court stated that judges enjoy absolute immunity from personal liability for their judicial or adjudicatory acts. 484 U.S. at 227-28 (1988). Forrester described quintessential judicial acts as being those that "involve resolving disputes between parties who have invoked the jurisdiction of a court." Id. What distinguishes a judicial act from an administrative

act is the character of the act itself, rather than who is making the decision. Id. (citations omitted). In addition to the requirement that such officials must act within their judicial capacity to be afforded absolute immunity, they must also not be doing so in the "clear absence of all jurisdiction." See Stump v. Sparkman, 435 U.S. 349, 354-55 (1978) (quoting Bradley v. Fisher, 13 Wall. 335, 351 (1872)) (granting a judge absolute immunity because he satisfied both requirements of having acted within his judicial capacity in a matter over which he had jurisdiction.). The Forrester Court explained that the purpose of absolute immunity is to prevent an influx of "powerful incentives for judges to avoid rendering decisions likely to provoke such suits." 484 U.S. at 227-28 (citations omitted).

In this case, it is clear that the plaintiff is precluded from asserting any claims against the district and circuit judges for the roles they played in the adjudication of the claims he filed in the New Mexico litigation. This is because the judges were clearly acting in their judicial capacity in a matter over which they clearly had proper jurisdiction. The district judge was clearly acting within his judicial capacity when, in connection with addressing issues related to the claims raised in the plaintiff's complaint, the judge, for example, ruled that certain evidence would be excluded, determined whether the 748-page document offered by plaintiff qualified as a self-authenticated document, permitted physicians to view plaintiff's medical history, determined which statute of limitations was applicable to the case, dismissed a claim for lack of jurisdiction, and disallowed a private claim because it had been filed under the FCA. Likewise, the circuit judges were also acting within their judicial capacity when they reviewed the district court's decisions. These actions were taken in an effort to resolve a legal dispute

that had been initiated by the plaintiff, and therefore, are clearly within the quintessential definition of judicial acts as defined in Forrester. In addition, it is undisputed that both the District Court, under 28 U.S.C. § 1331 (2000),[5] and the Circuit Court, under 28 U.S.C. § 1291 (2000),[6] acted within their jurisdiction when they performed the acts being challenged by the plaintiff in the lawsuit now before this Court. Accordingly, all of the defendant judges are entitled to absolute immunity, and are therefore shielded from any civil liability for the acts they performed.

IV. Conclusion

In view of the foregoing analysis, the plaintiff's claims against the defendants must be dismissed because they fail to state any claims upon which relief can be granted.[7]

SO ORDERED this 7th day of February, 2003.

s/Reggie B. Walton
United States District Judge

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5. Under 28 U.S.C. § 1331, a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The plaintiff's claims for violations of the ADA, Rehabilitation Act, and Title VII, that he pursued in the New Mexico court were clearly claims arising under federal law.

6. 28 U.S.C. § 1291 provides that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." There is no dispute that the Tenth Circuit had jurisdiction to review the final decisions of the New Mexico district court.

7. An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER, Plaintiff, v. BILL RICHARDSON, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE), Defendant.	}	No. 99 -1059 PK/KBM

RESPONSE TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGEMENT

The relevant portion of this pleading follows below in regard to the issue of untimeliness.

Defendant makes three arguments, the first is that: "This Court Lacks Jurisdiction Because Plaintiff's Judicial Complaint is Untimely." Defendant also claims that the thirty day period to file an appeal of an MSPB decision is jurisdictional. Plaintiff will outline below alleged continuing violations of Defendant towards Plaintiff. The United States Supreme Court has ruled that:

> "...filing a timely charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to . . . Title VII ( ) is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to

waiver, estoppel, and equitable tolling ..." See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

The Tenth Circuit has ruled that "the Continuing Violation theory is an equitable tolling doctrine . . ." See Patricia Baty v. Willamette Industries, Inc., No. 96-2181 JWL in the D.C. Kansas. See also Seals v. Oil Data, Inc., No. 96-5149, 1977 U.S. App. LEXIS 2360, 1997 WL 57133 at *1 (**10th Cir.** Feb. 12, 1997) (citing Mascheroni v. Board of Regents, 28 F.3d 1554, 1560 (**10th Cir.** 1994)).

Plaintiff filed a Petition for Review with the Board of the MSPB's 4/6/98 Initial Decision, and subsequently a motion to dismiss his petition for Board review without prejudice until December 15, 1998, or until 30 days from the date of a final decision by the DOL, whichever occurred first, which was granted. Plaintiff re-filed his petitions with the Board on 1/25/99, and requested another dismissal without prejudice (41 days late). This untimely filing is subject to equitable tolling of the continuing violation doctrine as outlined above.

To benefit from the continuing violation theory, the plaintiff must show either (1) a series of related acts taken against a single individual, one or more of which falls within the limitations period or (2) the maintenance of company-wide policy of discrimination both before and during the limitations period which evidences a pervasive institutionalized system of discrimination. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (**10th Cir.** Feb. 29, 1996) (citing Purrington v. University of Utah, 996 F.2d 1025, 1028-29 (10th Cir. 1993); Bruno v. Western Elec. Co., 829 F.2d 957, 961 (**10th Cir.** 1987)).

With respect to the first option above, the **Tenth Circuit** has set forth several nonexclusive considerations to help determine whether the alleged incidents of discrimination constitute a continuing violation or are discrete unrelated acts: (1) subject matter; (2) frequency; and (3) permanence. Mascheroni, 28 F.3d at 1561.

Subsequent to his removal on 12/10/97 Plaintiff had sought employment with no success. Plaintiff knows that there is significant competition for very few jobs in Southern New Mexico. Due to this fact and the absence of any solid evidence, Plaintiff had no reasonable basis for filing a complaint against Defendant due to his rights being violated. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1166 (7th Cir. 1996); Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 344 (7th Cir. 1999); Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998).

Up to and after the period of delay (12/15/98 to 1/25/99) for Plaintiff to re-file his petitions to the Board, Plaintiff had no reasonable basis to assume that his rights were being violated by Defendant. This changed on 9/26/99 when Plaintiff learned that the Carlsbad Environmental Monitoring and Research Center ("CEMRC"), funded by the Defendant, had hired an individual who had no college degree for a job that Plaintiff had applied for. Plaintiff received a notice from CEMRC that he would not be hired only a couple of weeks before the individual with no college degree was hired. Plaintiff had more than seven years of experience and a graduate degree that were directly related to the CEMRC job. Plaintiff then became very aware that his rights were allegedly being violated by Defendant in the same manner as when he had been an employee of Defendant. E.g.: his character and abilities were

being attacked to effect his employment. Plaintiff applied for many jobs, with the vast majority of the prospective employers not expressing any interest in hiring Plaintiff despite his high educational level and very broad range of experience.

Plaintiff had applied for three jobs during the period of delay (12/15/98 to 1/20/99) without any results. See Exhibits BL-6 thru BL-8 of Evidence of the Alleged Unlawful Blacklisting of Plaintiff served on 10/3/00. This allegation of Continuing Violation satisfies the first option above of "a series of related acts taken against a single individual" and also satisfies the three "nonexclusive considerations" set by the **Tenth Circuit** noted above.

In addition to satisfying the first option for showing continuing violation, Defendant's alleged violations have also satisfied the second option of demonstrating institutional type violations before, during, and after the period of delay. From 1/93 thru 1/96, while Plaintiff was an employee of Defendant, Exhibit O'Leary enclosed at 10, 15, & 20 - 25 clearly demonstrates institutional type violations of Defendant. During the 41 day period of delay are Exhibits DOL-1thru DOL-3 enclosed. Exhibit DOL-1 was received by Plaintiff on 12/15/98 and the delay of receipt of this document dated 12/11/98 was experienced by Plaintiff's DOL Complaint attorney Mr. Edward Slavin, Jr.. A complaint was expressed about the delay in receipt of Exhibit DOL-1, and this is why Plaintiff received the next document from Defendant, Exhibit DOL-3, by Federal Express. One example of a knowingly false representation, which is alleged to have been passed on to DOL judge Lasky by Mr. Ron O'Dowd of Defendant's Albuquerque office, was that Plaintiff had made a "mere oral comment" on 1/5/98 to an agent of the

Environmental Protection Agency ("EPA"). Defendant has used this knowingly false representation to eliminate jurisdiction of Plaintiff's claims related to the Clean Air Act ("CAA") employee protection provision coverage. See Exhibit DOL-1 at 4.

Defendant admits that Plaintiff made written comments and NOT a mere oral comment to EPA. See Exhibit DOL-3 at 3. This admitted violation is described within Exhibit DOL-2 at 1 thru 3. Numerous individuals, part of Defendant's agency, know of this false representation made for the express purpose of stripping Plaintiff of his civil rights and nothing has been done to correct this violation. This argument is an independent basis to justify the application of the Continuing Violation Doctrine. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (**10th Cir.** Feb. 29, 1996).

The institutional type Title VII violations of Defendant continue on to this day with no end in sight. This is clearly demonstrated within the enclosed Additional Evidence of the Alleged Unlawful Processing of Plaintiff's Fifth EEO Complaint of Discrimination and Retaliations ("Exhibit EEO-V Processing - II") and the initial evidence of this served on 10/3/00.

The second argument that Defendant makes is that: "This Court Lacks Jurisdiction to the Extent Plaintiff is Appealing the Board's Dismissal of His Claims for Untimeliness." First of all, the U.S. Supreme Court has ruled that filing a timely Title VII charge is not jurisdictional and subject to equitable tolling. Plaintiff is not appealing the Board's dismissal of his claims for untimeliness. What is being appealed is the Board's lack of review of Plaintiff's case on its

merits. The continuing violations of Defendant should equitably toll the issue of untimeliness as outlined above. With the untimeliness issue equitably tolled, the United States Court of Appeals for the Federal Circuit does not have jurisdiction to review Plaintiff's case on it merits per 5 U.S.C. § 7703 (a) (2).

If the argument Plaintiff made in support of this Court's granting him equitable tolling for the issue of untimeliness is sound, Defendant's argument directly above is moot. **If Defendant's argument here was accepted, it would** make the equitable tolling for the continuing violations doctrine meaningless and overturn all of the case law Plaintiff cited above. Also, when considering a motion for summary judgement, the court must examine all the evidence in the light most favorable to the non-moving party. See Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995); Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

Prayer for Relief:

Plaintiff prays that this Court will recognize, thru the very specific detailing above, that the Continuing Violation Doctrine does indeed apply to this instant case, grant Plaintiff equitable tolling for untimeliness, and deny Defendant's Motion for Partial Summary Judgement.

Dated: October 16th, 2000

Respectfully submitted,
s/Tod N. Rockefeller
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